on the contract for the agent. As the third party intended to have only one person on the contract with him, unless he will be made to suffer by the adoption of the rule of agency that the principal will be regarded as that person, there seems no reason for giving the third party a windfall which logic and reason do not support.[27] But the courts, though there have been but few cases, do hold the agent on the undertaking,[28] thus in effect keeping him on the contract as an extra party, for good measure. Theoretically, the agent's liability in the extraordinary situations in which it is to the interest of the third party to pursue him instead of his principal should be in tort, or the result of an estoppel.

There may be some who have difficulty in recognizing that, when all arrangements are made by an agent possessed of an intellect and free will, a contract can be effected between a third party and a partly undisclosed, or even a wholly disclosed principal. For them it is suggested that the line of thought shown here in the case of the wholly undisclosed principal resting upon the doctrine of identity might be utilized to cover all three types of principals. The result then urged would be this, that the moment an agent enters the field of contracts, as when he enters the field of torts, the doctrine of *respondeat superior* accompanies him in his dealings and, by its strength alone, adds the responsibility of another party, the principal, to the responsibility already resting upon the agent in contract or tort.

SILENCE AS ACCEPTANCE IN THE FORMATION OF CONTRACTS. — "He who remains silent certainly does not speak; but nevertheless it is true that he does not deny."[1] The situation expressed by this truism has been the source of considerable confusion in our law of contracts. The decisions are almost as varied as the jurisdictions, and nowhere do we find an adequate analysis of the questions involved or the principles upon which they must be decided. Though acceptance of an offer is usually made by spoken or written words, quite often the offer may call for an act or authorize some other mode of acceptance. As the offeror is the "czar of his offer" such acts, when induced by the offer,[2] constitute an

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[27] "The rule is probably the outcome of a kind of common-law equity, powerfully aided and extended by the fiction of the identity of principal and agent and the doctrine of reciprocity or mutuality of contractual obligations," HUFFCUT, AGENCY, § 120, speaking of the liability of the wholly undisclosed principal and of his right to sue.

[28] Of the cases in note 7, *supra*, Jones *v.* Littledale and Magee *v.* Atkinson were actions of assumpsit; Bartlett *v.* Raymond was "contract for goods sold and delivered." The action in Meyer *v.* Redmond brought under the New York Code is described by Haight, J., in the opening of his opinion at p. 480, as follows: "This action was brought to recover damages which the plaintiff is alleged to have suffered by reason of the failure of the defendants to perform their contract."

[1] Digest, L, 17, 142 (Paulus). See POUND, READINGS IN ROMAN LAW, 2d. ed., 25–26.

[2] If the act is performed in ignorance of the offer, as where a reward is offered for the capture of a felon, there is no contract. Ball *v.* Newton, 61 Mass. 599 (1851); Fitch *v.* Snedaker, 38 N. Y. 248 (1868); Williams *v.* West Chicago St. Ry. Co., 191 Ill. 610, 61 N. E. 456 (1901). The English courts have entertained a contrary view. Williams *v.* Carwardine, 4 B & Ad. 621 (1833); Gibbons *v.* Proctor, 64 L. T. (N. S.) 594 (1891). Also, if the offeree expressly states that his acts are not performed in accept-

acceptance.[3] In such cases there is something external by which to judge the intent of the parties. But where the mere passive conduct of the offeree is claimed to be an acceptance, the question is more difficult.

In considering this problem, some difficulty has arisen because of the failure of the courts to consider the difference between an offer for a unilateral and one for a bilateral contract and the difference in the situations produced thereby. In the case of the former the courts often have allowed recovery, purportedly on the basis of contract, which can be justified only on some other ground. If A sends goods to B under a contract which is later rescinded by agreement and A tells B that he must pay a certain sum in cash or return the goods, the mere retention of the goods by B[4] does not constitute a contract.[5] B has performed neither of the alternatives contained in the offer. True, he may be held liable because of his duty to return the goods, but such liability must be founded upon the conversion of the goods or in quasi contract for their value. Even from an objective standard, the contract does not comply with the terms of the offer. However, where the "acceptance" if effective would create a contract executory on both sides, we have presented the unavoidable question, May silence be construed as acceptance?[6]

The problem may arise with the offeree as the plaintiff. Where the offer authorizes an ambiguous act as acceptance, the performance of such an act with the intent to comply with the offer creates the contract.[7] It is not sufficient to answer that the proof of intent is more or less within the arbitrary power of the offeree; the offeror must have understood the situation he was creating. Likewise, where the offer expressly or impliedly authorizes silence as acceptance, such passive conduct on the part of the offeree in compliance therewith should form a binding contract. But the courts seem willing to go only to this extent: That if the offeree chooses to make acceptance in the manner thus authorized, the offeror has but himself to blame if the situation is unsatisfactory, but that the offeror cannot by his own act put the offeree in the position

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ance of the offer, there is no contract. Lamson Consolidated Co. *v.* Weil, 15 Daly, 498, 8 N. Y. Supp. 336 (1890).

[3] A. B. Dick Co. *v.* Fuller, 213 Fed. 98 (1914); Mooney *v.* Daily News Co., 116 Minn. 212, 133 N. W. 573 (1911); De Wolf Co. *v.* Harvey, 161 Wis. 535, 154 N. W. 688 (1915).

[4] These were substantially the facts in Wheeler *v.* Klaholt, 178 Mass. 141 (1901). Yet the court held that there was a contract, Holmes, C. J., saying: "A jury would be warranted in finding that a neglect of the duty to return imported an acceptance of the alternative offer to sell" (p. 145). This ignores the stipulation as to cash. It seems clear that the offeree could not, by mere retention of the goods, have effected a contract when the offer was for cash only.

[5] A distinction must be made between promises "implied in fact" and those "implied by law." Thus, if A does work for B, with the latter's knowledge, but without any express request, and B accepts the work or its results, by pure inference of fact B's conduct is acceptance. But if B does not know of the work, the only basis of liability is in quasi contract upon the promise "implied by law" to prevent unjust enrichment. See Day *v.* Caton, 119 Mass. 513, 516 (1876).

[6] Here recovery must be had, if at all, upon principles of contracts and may not well be confused with recovery in tort or in quasi contract.

[7] Where the act is performed without intent to accept the known offer, there is no contract, as is illustrated by the "reward cases." Hewitt *v.* Anderson, 56 Cal. 476 (1880); Vitty *v.* Eley, 51 App. Div. (N. Y.) 44 (1900). Where similar acts are done with intent to accept, there is a contract. Wentworth *v.* Day, 44 Mass. 352 (1841); Cummings *v.* Gann, 52 Pa. St. 484 (1866).

where he must speak or by his silence create a contractual obligation.[8] It will be noted that the tendency in this view is to make the situation one-sided. In practical effect, there is a contract only if the offeree chooses so to consider it. This puts one partly unfairly at the mercy of the other.

To remedy this injustice the common-law courts say that where the offeror is the plaintiff, silence by the offeree will constitute acceptance if there is a *duty* to speak, as distinguished from the mere right.[9] But from what does this duty arise? An examination of the cases shows that the word is used, not in the sense of a legal obligation, but, morally, a duty of conscience.[10] The theory seems to be something akin to estoppel. Thus, in a recent case [11] the offeree was held to have been under a duty to notify the offeror of his rejection of an offer which he had induced. It seems illogical and extremely unsatisfactory to consider that one can be estopped into a contract except in the general sense that the standard for the legal significance of all conduct is external. Estoppel in any other sense is the last refuge of a mind predetermined by a hard case and should have no place in the formation of contractual obligations.[12]

In the civil law, notwithstanding its usual subjective standard, conduct, which in the ordinary experience of life would be taken as acceptance, so is treated. Silence is acceptance when in honest and practical understanding it would be so considered.[13] It is submitted that this test is more in accord with our objective standard than the test of moral duty. Further, it can be applied more easily and practicably to the individual situation. It would seem that this view is, in effect, supported by many decisions, though the principle is not clearly stated. Thus, an unbroken line of decisions [14] holds that one who with knowledge re-

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[8] See Felthouse *v.* Bindley, 11 C. B. (N. S.) 869 (1862); *In re* Empire Assurance Corp., L. R. 6 Ch. 266 (1871); Prescott *v.* Jones, 69 N. H. 305, 41 Atl. 352 (1898).

[9] Day *v.* Caton, 119 Mass. 513 (1876); Emery *v.* Cobbey, 27 Neb. 621, 43 N. W. 410 (1889); Robertson *v.* Tapley, 48 Mo. App. 239 (1891). "It is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected unless he was subject to a duty of speech, which he neglected to the harm of the other party." Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6, 9, 12 Atl. 607 (1888).

[10] "He who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to be silent." Nicholas *v.* Austin, 82 Va. 817, 825, 1 S. E. 132, 137 (1887). "But if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak." Day *v.* Caton, 119 Mass. 513, 515 (1876).

[11] Cole-McIntyre Norfleet Co. *v.* Holloway, 214 S. W. (Tenn.) 817 (1919). For a statement of this case, see RECENT CASES, *infra*, p. 614.

[12] "There is, indeed, in a case of this kind some reason for urging that the party making the revocation should be estopped to claim that his attempted withdrawal was not binding upon himself; but this could not be done without infringing upon the inexorable rule that one party to a contract cannot be bound unless the other be also, notwithstanding that the principle of mutuality thus applied may enable a party to take advantage of the invalidity of his own act." Brown, J., in Patrick *v.* Bowman, 149 U. S. 411, 424. For a discussion of the analogous question of estoppel in the case of rejection of an offer by mail see Ashley, "The Rejection of an Offer," 12 YALE L. J. 419, 423.

[13] See 1 DERNBURG, PANDEKTEN, § 86 (2); POUND, READINGS IN ROMAN LAW, 2d ed., 26.

[14] Phila. &c. R. Co. *v.* Cowell, 28 Pa. St. 329 (1857); Foster *v.* Rockwell, 104 Mass. 167, 171 (1870); Heyn *v.* O'Hagen, 60 Mich. 150, 157, 26 N. W. 861 (1886); Coffin *v.* Planters' Cotton Co., 124 Ark. 360, 187 S. W. 309 (1916).

mains silent when another purports to make a contract as his authorized agent is liable on such contract. This seems logical. Theoretically, acceptance is but the expression of a condition of the mind and may be evidenced by passive as well as by active conduct of the offeree. If, under the circumstances, in the ordinary experience of life, the honest and practical understanding of the silence would be that it meant acceptance, there is a contract. If the transaction would be held a contract at the suit of the offeree, the result should be the same if the offeror is the plaintiff. There is no necessity for loose theories of estoppel and moral duty. Judged by the usual objective standard of our law, silence as acceptance presents no difficulty other than that of mode of proof.

WHEN SHOULD *CY-PRÈS* APPLICATION OF CHARITIES BE ALLOWED?[1] —When conditions have so materially changed that it is no longer possible or expedient to devote property to the particular charity for which it was given, the question arises as to the disposal to be made of the property. If a testator, dying before the adoption of the Thirteenth Amendment, had ordered that the income of a trust he created should be used in freeing American slaves, should his heirs have taken the funds on the abolition of American slavery,[2] or should the property have been devoted to some other charity? We must also consider whether any circumstance, other than impossibility of following the donor's directions, is sufficient to justify a deviation from the original use.

A trust for charitable purposes when once created, like any private trust, is clearly irrevocable.[3] Nor does it appear that the creators of trusts or their representatives have any right, by agreement with the trustees or otherwise, to compel a different use of the trust funds or property,[4] the right to alter differing only in degree from the right to revoke. Neither can those persons who happen to be beneficiaries at a particular time give a valid assent to an alteration of the charitable use, since those beneficiaries, from the very nature of a charitable trust, do not represent all those who are likely to be benefited in the future.[5] Further, the attorney-general, though he be the general representative of the beneficiaries,[6] does not seem to be the proper person to change the

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[1] The doctrine of *cy-près* discussed here is to be distinguished from the doctrine of *cy-près* with respect to the construction of limitations of future estates. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 643 *et seq.*

[2] Jackson *v.* Phillips, 14 All. (Mass.) 539 (1867).

[3] St. Joseph's Orphan Society *v.* Wolpert, 80 Ky. 86, 89 (1882); Mott *v.* Morris, 249 Mo. 137, 155 S. W. 434 (1913); Maxcy *v.* City of Oshkosh, 144 Wis. 238, 256, 128 N. W. 899, 907 (1910).

[4] Christ Church *v.* Trustees, 67 Conn. 554, 35 Atl. 552 (1896); St. Paul's Church *v.* Attorney-General, 164 Mass. 188, 41 N. E. 231 (1895). The courts readily infer an intent that the trust should be perpetual. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 60. See also College of St. Mary Magdalen *v.* Attorney-General, 6 H. L. 189, 205 (1857); Perin *v.* Carey, 24 How. (U. S.) 465, 507 (1860); Odell *v.* Odell, 10 All. (Mass.) 1, 6 (1865).

[5] The beneficiaries of a charity trust, as a whole, are indefinite. See *Re* Lavelle, [1914] 1 I. R. 194; Dexter *v.* Harvard College, 176 Mass. 192, 57 N. E. 371 (1900); *Re* MacDowell's Will, 217 N. Y. 454, 112 N. E. 177 (1916).

[6] See *Re* Foraker, [1912] 2 Ch. 488, 492.